No. 14-723

IN THE

Supreme Court of the United States

ROBERT MONTANILE,

Petitioner,

v.

BOARD OF TRUSTEES OF THE NATIONAL ELEVATOR INDUSTRY HEALTH BENEFIT PLAN,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

This was a good-faith contract dispute involving complex questions, including one that split the circuits and took this Court to resolve. Mr. Montanile lost. Now, the question before this Court is whether ERISA permits Respondent to obtain damages for Mr. Montanile's breach through an "equitable lien by agreement" against his general assets. The answer is no.

Liens offer recourse against specific property, not persons. That is true whether the lien is statutory or equitable. And it is true whether the lien is imposed to avoid unjust enrichment or by agreement.

Under the label of "equitable lien by agreement," the decision below approved a personal money judgment against the general assets of Mr. Montanile. That was error. An agreement can define the scope of property to which a lienholder is entitled. But no agreement can create a lien that is enforceable against something other than specific property. That is simply not a lien. It is an attempt "'to impose personal liability for a contractual obligation to pay money.'" *Sereboff* v. *Mid Atl. Med. Servs.*, 547 U.S. 356, 363 (2006) (quoting *Great-West Life & Annuity Ins. Co.* v. *Knudson*, 534 U.S. 204, 210 (2002)).

Respondent labors to read this Court's cases differently. Br. 13-25. But as explained by Petitioner and the United States, it cannot. Pet. Br. 16-36; U.S. Br. 8-18. Undeterred, Respondent invites this Court to declare prior "equitable relief" cases a dead letter. *See* Br. 23 (this Court has "effectively limited *Mertens* and *Great-West* to their facts."). But those cases have reflected this Court's law for over two decades, and the Court has repeatedly invoked those cases in its recent decisions.

Respondent cannot wish them away because it dislikes the result.

As a doctrinal hook, Respondent offers two new remedies never before considered by this Court (or the courts below) in an ERISA case: (i) the substitutionary monetary decree and (ii) the deficiency judgment. Br. 36-46. But as Petitioner and the United States have explained, both are legal remedies occasionally awarded by pre-merger equity courts. Pet. Br. 36-42; U.S. Br. 21-26. Respondent offers little, if any, response.

Instead, Respondent pins its hopes for affirmance on this Court's policy heartstrings. Letting ERISA participants and beneficiaries avoid repayment, it argues, will unacceptably drive up the cost of plans. Br. 46-57. Come hell or high-court intervention, Respondent declares, Mr. Montanile must pay.

Aside from being directed at the wrong institution, Respondent's policy arguments are overblown. Similarly situated litigants said precisely the same thing nearly fifteen years ago in *Great-West*. Since then, the world has not crumbled, and Congress has not rushed in to correct this Court's alleged error. As this Court and ERISA litigants well know, Congress' decision to limit 29 U.S.C. § 1132(a)(3) to "equitable relief" has its pluses and minuses. But it is up to Congress, and Congress only, to change that equation.

I. An Equitable Lien by Agreement Cannot Be Enforced Against General Assets.

A. In *Great-West*, this Court made clear that an equitable lien under ERISA may only be enforced against specific property in the possession of a beneficiary—never against general assets. 534 U.S. at 213-14.

In *Sereboff*, this Court reaffirmed that core principle. 547 U.S. at 361-63 (Section II.A) (holding that the nature of the recovery sought by Mid Atlantic was equitable because the present possession requirement was met). Indeed, in Section II.A of its opinion, *Sereboff* expressly held that:

- The "impediment to characterizing the relief in [*Great-West*] as equitable is not present here [because] Mid Atlantic sought funds that were set aside and 'preserved [in the Sereboffs'] investment accounts.'" *Id.* at 363;
- "Unlike Great-West, Mid Atlantic did not simply seek 'to impose personal liability for a contractual obligation to pay money.'" *Id.* (quoting *Great-West*, 534 U.S. at 210); and
- Mid Atlantic "sought its recovery through [an] equitable lien on a specifically identified fund, not from the Sereboffs' assets generally, as would be the case with a contract action at law." *Sereboff*, 547 U.S. at 363.

Only after making clear that present possession is a threshold requirement for the enforcement of any equitable lien did this Court address the *additional* requirements for enforcement of an equitable lien by agreement. *See Sereboff*, 547 U.S. at 363-69 (Section II.B) (holding that the basis for the claim asserted by Mid Atlantic was also equitable).

B. Nonetheless, Respondent insists that the issue remains open for two reasons:

1. Respondent argues that *Sereboff* actually supports its "lien-on-general assets" position. Br. 13-19. According to Respondent, *Great-West* was limited to

"only the type of 'equitable lien' that is 'intended to prevent unjust enrichment.'" Br. 18 (internal cites omitted). And, Respondent says, *Sereboff* actually endorsed the proposition that equitable liens by agreement are quasi-contracts entitling the lienholder to recover damages if the debtor no longer possess the pledged res. Br. 17. Not so.

In *Sereboff*, the plan participant and beneficiary (represented by the same counsel now representing Mr. Montanile) argued that the equitable lien sought by the ERISA plan fiduciary (Mid Atlantic) could not be enforced because the third-party tort settlement, although currently in the Sereboffs' possession, was not traceable to specific property that Mid Atlantic had originally possessed.[1]

The Court rejected that type of tracing requirement, explaining that unlike equitable liens sought to avoid unjust enrichment, equitable liens *by agreement* can reach things even if they were never in plaintiff's possession. But nothing in *Sereboff* holds or suggests that an equitable lien by agreement can somehow make a lien enforceable against the debtor's general assets. And that is the proposition—"a lien-on-general-assets" theory—that Respondent must defend.

Sereboff made quite clear that present possession of the res is a condition for *all* equitable liens—*i.e.*, whether to avoid unjust enrichment or by agreement. Indeed, as the United States has explained, that entire section of the *Sereboff* opinion would have been

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[1] The Fourth Circuit in *Sereboff* had imposed an equitable lien of the *Great-West* variety—*i.e.*, to avoid unjust enrichment. Consequently, the Sereboffs' principal argument in its opening brief in this Court was one of tracing. *See* Brief for Petitioners at 17-23, *Sereboff v. Mid Atl. Med. Servs.*, 547 U.S. 356 (2006) (No. 05-260).

unnecessary if, as Respondent suggests, a lien by agreement can operate without a debtor in possession of the res. U.S. Br. 13-17. Respondent offers no response.

2. In an implicit concession that its position would be foreclosed by *Mertens* and *Great-West*, Respondent asserts that *CIGNA Corp.* v. *Amara*, 131 S. Ct. 1866 (2011) "effectively limited *Mertens* and *Great-West* to their facts." Br. 23. *CIGNA* did no such thing, and Respondent's contrary characterization is meritless.

According to Respondent, *CIGNA* proves that "'money payment[s],'" even "*compensatory*" payments, fell within "'the category of traditionally equitable relief.'" Br. 24 (emphasis in original) (quoting *CIGNA*, 131 S. Ct. at 1879). But this simply ignores that *CIGNA*'s logic was rooted directly in the particular claim at issue: unlike the vast majority of equity cases, in fiduciary cases, monetary damages may be recovered from a breaching *fiduciary's* general assets because of the specific equitable remedy of surcharge. *See CIGNA*, 131 S. Ct. at 1880 (citing multiple sources explicitly discussing actions against "trustees" for "a breach of trust").

That rule is exactly the opposite of the traditional rules that apply in all *non-fiduciary* settings. And that is why *CIGNA* itself—in a passage Respondent conspicuously ignores—specifically distinguished *CIGNA*'s fact pattern from the Court's other cases: "Thus, insofar as an award of make-whole relief is concerned, the fact that the defendant in this case, *unlike the defendant in Mertens*, is analogous to a trustee *makes a critical difference*." *Ibid.* (emphases added).

"[A]ppropriate equitable relief" is not a one-size-fits-all proposition; relief *appropriate* for one defendant may

not be appropriate for others. Respondent has no logical basis for presuming that *CIGNA*'s remedies against fiduciaries would apply in all cases, including those against beneficiaries; and Respondent has especially no reason to draw that conclusion in light of *CIGNA*'s express statement distinguishing those cases on this "critical difference."

But Respondent need not take this Court's word for it. Congress itself drew the very same line in ERISA's remedial scheme, crafting different remedies in suits for and against fiduciaries. *Compare* 29 U.S.C. § 1109(a) (authorizing litigation to recover from personal assets any losses caused or gains to a breaching "fiduciary"); 29 U.S.C. § 1132(a)(2) (authorizing "participant[s]" and "beneficiar[ies]," among others, to bring actions under Section 1109), *with* 29 U.S.C. § 1132(a)(3) (limiting recovery to "appropriate equitable relief").

Accordingly, Respondent is mistaken that *CIGNA* (without saying so) intended to sharply limit *Mertens* and *Great-West*—particularly when it expressly relied on those cases and distinguished them on a firmly grounded "critical difference." As *CIGNA* separately explained, "traditionally speaking, relief that sought a lien or a constructive trust was legal relief, not equitable relief, unless the funds in question were '*particular* funds or property in the defendant's possession.'" 131 S. Ct. at 1879 (quoting *Great-West*, 534 U.S. at 213) (emphasis in original). *See also Sereboff*, 547 U.S. at 363 (reaffirming exactly that rule from *Great-West*).[2]

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[2] In attempting to distinguish this Court's cases, Respondent suggests that "dissipation" is relevant only for "restitution or unjust enrichment," not "equitable lien[s] by agreement." Br. 32-33. This contention is inconsistent with *Sereboff*, which plainly treated the line in *Great-West* as controlling. The Court never once said that

C. This Court's precedent forecloses Respondent's argument. But even revisiting first principles, Respondent's version of pre-merger equity practice is demonstrably wrong.

1. Respondent, as its lead argument, argues that the foundational principle of equity is that there are "no rights without remedies." Br. 26-27. Respondent's decision to focus at the highest possible level of generality is telling: If there were any merit to Respondent's doctrinal position, it would lead with precedent, not platitudes. But Respondent cannot support its position with any cases or treatises that directly raise and resolve this question in its favor. Congress was well aware that limiting relief to "appropriate *equitable* remedies" would mean that certain harms remediable only at law would go unaddressed. Respondent cannot invoke a general aim of providing relief to overcome the specific limits on equitable doctrine. *Cf., e.g., Aetna Health Inc.* v. *Davila*, 542 U.S. 200, 222 (2004) (Ginsburg, J., concurring) ("A series of the Court's decisions has yielded a host of situations in which persons adversely affected by ERISA-proscribed wrongdoing cannot gain make-whole relief.").

(i) the remedy was allowed because the defendant *once* had possession; or (ii) *Great-West* is distinguishable because it supposedly involved restitution or a different kind of equitable lien. *Sereboff*, 547 U.S. at 362-63. *Sereboff*'s sole rationale was that the remedy was equitable because the "impediment to characterizing the relief in [*Great-West*] as equitable is not present here"—"Mid Atlantic sought 'specifically identifiable' funds that were 'within the possession and control of the Sereboffs.'" *Ibid.* This is why the relief did not impermissibly target "the Sereboffs' assets generally." *Id.* at 363. This Court presumably meant what it said, and Respondent has offered no sound basis for thinking otherwise.

Respondent says its rule would not "render Section 502(a)(3)'s distinction between legal and equitable remedies superfluous," Br. 27, but that is exactly what it would do. If it were sufficient to identify an "equitable lien by agreement," for example, then cases like *Sereboff*—would start and stop with a simple finding that the beneficiary breached an agreement and was automatically compelled "'to perform his duty rather than violate it.'" *Id.* (citation omitted).

Instead, however, this Court has consistently asked whether there was "a specifically identified fund" in the defendant's possession. *U.S. Airways, Inc.* v. *McCutchen*, 133 S. Ct. 1537, 1545 (2013) ("The 'nature of the recovery' requested was equitable because [the plan] claimed 'specifically identifiable funds' within the [beneficiaries]' control—that is, a portion of the settlement they had gotten."); *Sereboff*, 547 U.S. at 363 ("This Court in *Knudson* did not reject Great-West's suit out of hand because it alleged a breach of contract and sought money, but because Great-West did not seek to recover a particular fund from the defendant. Mid Atlantic does."). This is the precise line that effectively prevents converting all relief into compensatory damages, *e.g.*, *Great-West*, 534 U.S. at 210; Respondent's approach would erode that line completely.[3]

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[3] Respondent is incorrect that Mr. Montanile's argument is premised "on a simplistic dichotomy" asking whether relief is sought against "general assets" or "specific property." Br. 28. In traditional practice, different equitable remedies were appropriate in different situations: a surcharge, for example, authorized recovery against general assets *because that reflected the historic nature of that particular claim*. An equitable lien, by contrast, has always been limited to "'particular funds or property in the defendant's possession.'" *Sereboff*, 547 U.S. at 362 (quoting *Great-West*, 534 U.S. at 213). It is *Respondent's* view that proposes a true

2. According to Respondent, "courts in the days of the divided bench" recognized equitable liens over both "the property itself" and "its value," thus entitling parties to pursue a defendant's general assets. Br. 29 (citing *Walker* v. *Brown*, 165 U.S. 564, 666 (1897); 1 George E. Palmer, *The Law of Restitution* § 2.14, at 176 (1978)). This is twice wrong.

Respondent is first wrong because the *bare existence* of an equitable lien (even somehow over intangible "value") does not automatically entitle a party to a "monetary judgment." *Contra* Br. 29. As this Court unmistakably established, there are *two* relevant factors in the inquiry: (i) "the nature of the recovery"; and (ii) "the basis for [the] claim." *Sereboff*, 547 at 363. Unless *both* are equitable, a plaintiff cannot recover under 29 U.S.C § 1132(a)(3). Thus even if the lien were somehow over "value" (whatever that means), Respondent would still have to identify the particular asset in Mr. Montanile's possession. *Contra* Br. 29-30 (wrongly collapsing the inquiry into a single question—whether an equitable lien exists, irrespective of the nature of the requested recovery).

Respondent is wrong a second time because its assertion distorts controlling precedent, including *Walker*, its lead authority. *Walker* never said that a plaintiff could simply establish its lien and then seek the equivalent of monetary damages. Br. 18, 29. On the

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"simplistic dichotomy," one this Court has already rejected: it is not enough to ask whether an equity court had ever granted a particular kind of relief, *contra* Br. 36-44, because "there were many situations . . . in which an equity court could 'establish purely legal rights and grant legal remedies which would otherwise be beyond the scope of its authority.'" *Mertens*, 508 U.S. at 256 (citation omitted).

contrary, *Walker* involved a situation where the specific property at issue—a set of bonds—was "admittedly in the hands" of the relevant party. 165 U.S. at 674-75. The Court had no occasion to address Respondent's theory, because the plaintiff there did what Respondent has failed to do here: identify the property subject to the lien. *Ibid.* Moreover, the *Walker* plaintiff, again unlike Respondent, *admitted* that it needed to identify the bonds, trace the proceeds ("value") from any sale of the bonds, or simply recover as a general creditor to the estate. *Id.* at 659 ("the lien was therefore operative upon the bonds in his possession or upon their proceeds if he had disposed of them, and if the proceeds could be traced to his estate, and if not that the estate was liable for the debt").

That effectively concedes—in a contemporary period—what Respondent refuses to concede here: liens cannot be enforced in equity without identifying the specific property subject to the lien or tracing that property to its clear proceeds. Unsurprisingly, in reciting the controlling "legal principles," that is exactly what the Court said: "It is clear that if the express intention of the parties was to create an equitable lien upon the bonds or the value thereof such equitable lien will be enforced by a court of equity *against the bonds in the hands of [defendant] or against third persons who are volunteers or have notice*." *Id.* at 664 (emphasis added); *see also id.* at 665 (quoting authority as holding that "an equitable lien is enforceable *against the property*") (emphasis added).

This says absolutely nothing about imposing a money judgment directly against the defendant simply because a lien exists (a mere predicate question) or simply because the defendant once had possession of the bonds (an insufficient factor in the analysis). Present

possession is required. *See, e.g.*, *McCutchen*, 133 S. Ct. at 1545; *Sereboff*, 547 U.S. at 362-63; *Great-West*, 534 U.S. at 213. In plucking the "value" phrase out of context, Respondent ignores every relevant feature of this case.[4]

Respondent likewise plucks the same language out of context in *Sereboff*. Br. 19. That language appeared in the section of the Court's opinion asking whether the claim had an equitable basis, not whether the relief was equitable in nature. *See* 547 U.S. at 363-68. The two ideas are analytically distinct, which is precisely why the Court analyzed the issues separately. *See also id.* at 364 (construing *Barnes* v. *Alexander*, 232 U.S. 117, 123 (1914), as authorizing a plaintiff to "'follow' a portion of the recovery 'into the [Sereboffs'] hands' 'as soon as [the settlement fund] was identified,' and impose *on that portion*"—not the defendants' assets generally—"a constructive trust or equitable lien") (emphasis added). In short, if Respondent's theory is right, this Court's decisions are wrong.[5]

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[4] Respondent faults Mr. Montanile for "attempt[ing] to apply unjust-enrichment principles to an action that does not sound in unjust enrichment," supposedly "the very thing that this Court warned against in *McCutchen*." Br. 33. Respondent's argument is premised on a clear logical error: The fact that unjust enrichment is not the same in *all* respects does not mean it is not the same in *any* respects. And, indeed, *McCutchen* specifically *rejects* Respondent's understanding of this Court's case law: "[t]he 'nature of the recovery' requested was equitable because Mid Atlantic claimed 'specifically identifiable funds,' within the Sereboffs' control." 133 S. Ct. at 1545.

[5] Respondent maintains that four other cases support its position, Br. 30-32, but Respondent misreads those cases. Among other things, *none* involves an equitable lien by agreement.

3. If Respondent's view were correct, traditional equitable relief would have been far simpler: there would have been no need to trace the disposition of assets, or establish "substitutionary" remedies, or attach accounts with "mingled" funds, or attempt any of the other machinations that Respondent now proposes (for the first time) as alternative grounds for seeking affirmance.[6] Parties would simply identify an equitable lien by agreement, assert that the beneficiary had previously received the funds, and demand a monetary judgment for the claimed amount. Yet that is decidedly *not* how equitable doctrine works, which is precisely why courts have assiduously demanded that parties identify the precise property or fund in question, or the precise proceeds traceable to that original property.

In the end, Respondent's theory is unsupportable in law and logic, and it has no basis in common experience or common sense. Under Respondent's view, courts and parties have wasted countless hours and resources identifying particular funds and tracing assets, when all that was necessary was identifying the lien in the first place. If Respondent were right, surely more courts would have said so before now—and surely fewer courts (*Sereboff* and *Great-West* included) would have engaged in the make-work of searching for the concrete object of a lien.

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[6] Respondent's "swollen assets" gambit, Br. 33-35, for example, would swallow the rule. If accepted, there would be virtually no cases (contrary to obvious experience) where equitable liens could not be enforced directly, as damages, against a party's general assets. Respondent's assortment of law-review "Note[s]" and "Comment[s]," Br. 33, 35, hardly establish what relief was "*typically* available in equity." *CIGNA*, 131 S. Ct. at 1878 (internal quotation marks omitted).

II. Respondent's Newly Minted Remedies Do Not Provide an Alternative Basis to Affirm.

Respondent's principal defense of the decision below is on alternative grounds. Br. 36-46. As previously explained by Petitioner and the United States, however, neither of Respondent's newly minted remedies is equitable. Pet. Br. 36-42; U.S. Br. 21-26. And, if viable and not already waived, either would require reversal and remand for further litigation.

A. Respondent's Newly Minted Remedies Do Not Constitute Equitable Relief.

In *Mertens* v. *Hewitt Associates*, this Court rejected the notion that any relief a pre-merger equity court might award is equitable. 508 U.S. at 256-58. Under the clean-up doctrine, equity courts frequently awarded legal relief that was a natural incident to the equitable disputes before the court. U.S. Br. 21-22. Both of Respondent's new remedies—the deficiency judgment and substitutionary-monetary decree—fall into that category.

1. The deficiency decree is clearly a legal remedy. Indeed, the very source that Respondent cites (Br. 39, 41, 43) to support the (incorrect) proposition that deficiency decrees are equitable—Pomeroy's treatise—calls the deficiency a "personal debt" that gives rise to a judgment "like every other legal money judgment" and "enforceable by execution against the general property of the judgment creditors." 4 Pomeroy § 1288, at 683.

Respondent also misunderstands the argument that Petitioner and the United States advance. The argument is *not* that deficiency judgments are legal because once upon a time equity courts could not award them. Rather, the argument is that equity courts could not award them *because* they were legal; if deficiency judgments were

always equitable, it would have been unnecessary to enact positive law to *authorize* the new remedy—equity courts would have been issuing the judgments all along. Pet. Br. 38; U.S. Br. 22-23. That States and the Federal Rules of Equity ultimately gave the equity courts *authority* to award a deficiency decree does not convert the *nature* of a deficiency decree, *i.e.*, a legal remedy providing money damages, into equitable relief.

The "substitutionary monetary decrees" invoked by Respondent are legal damages, plain and simple. *See* U.S. Br. 24. When an equitable lien, constructive trust, or other equitable remedy (*e.g.*, specific performance) was unavailable, an equity court might sometimes award "compensation as alternative relief." *Otis* v. *Otis*, 45 N.E. 737, 737 (Mass. 1897). But as the very cases Respondent cites make clear, the decree was legal relief sometimes available in a court of equity. *See, e.g.*, Br. 37 n.6 (citing *Shafer's Appeal*, 2 A. 365, 367 (Pa. 1885)).

Moreover, Respondent identifies no pre-merger equity cases awarding such a decree with an equitable lien by agreement. Instead, the only "substitutionary monetary decree" cases in Respondent's brief involved either tortious conduct or fiduciary breaches by an actual trustee. To be sure, it was not necessarily the defendant in each case who was the tortfeasor or trustee. But in every case, the defendant came into possession of property or funds rightfully belonging to plaintiff because of an earlier tortious act or an earlier fiduciary breach. The defendant dissipated that property or it was otherwise unreachable by tracing. Br. 36-39.

3. Apparently aware that its new remedies fail *Mertens*' "typically available at equity" test, Respondent suggests that *CIGNA* supplanted that test: "Is the

remedy the plaintiff seeks under Section 502(a)(3) 'exclusively equitable'?" Br. 42. It did not.

In *CIGNA*, this Court repeated the familiar "*typically* available in equity" test at the outset of its analysis under 28 U.S.C. § 1132(a)(3), and "exclusively equitable" was not mentioned. 131 S. Ct. at 1878. The Court explained that a "surcharge" was a special equitable remedy that permitted relief in "the form of a money payment." *Ibid.* In underscoring the point, the Court noted, "[i]ndeed, prior to the merger of law and equity this kind of monetary remedy against a trustee . . . was 'exclusively equitable.'" *Id.* at 1880. That kind of passing reference—in the course of a discussion about why a surcharge was still "traditionally equitable relief" (*ibid.*)—is not even close to proposing a "new test" that silently overrules established law.

B. In Any Event, Respondent's New Litigation Position Was Waived or Requires Remand.

1. Respondent insists Petitioner waived his laches argument,[7] Br. 45, but Respondent is the one pressing a new theory for the first time before this Court. Respondent sought recovery under an equitable-lien-by-agreement theory in the lower courts. At no point did

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[7] Petitioner's argument that Respondent waited too long to assert its reimbursement claim has legal significance in two ways, both of which reveal that Petitioner has waived nothing. First, Respondent's decision to wait six months after an exchange of final settlement offers, Pet. Br. 8, before bringing a lawsuit reveals the potential for abuse under Respondent's rule. Second, Respondent's delay is relevant to its ability to recover a deficiency judgment, a remedy that it never even mentioned in the Eleventh Circuit or district court. Petitioner cannot have waived a response to an argument that Respondent made for the first time before this Court.

Respondent mention deficiency judgments or substitutionary-monetary decrees. Instead, Respondent argued at every stage that it was required to "(1) identify a particular fund distinct from the defendant's general assets; and (2) identify a particular share of the fund to which it is entitled" in order to enforce its equitable lien. Appellee's C.A. Br. 25; Pl.'s Summ. J. Mot., ECF No. 36 at 5. And the lower courts agreed: Mr. Montanile's dissipation was entirely irrelevant to Respondent's ability to enforce its equitable lien. Pet. App. 11, 41.

Respondent says "a request for an equitable lien encompasses a request for a substitutionary monetary decree and a deficiency judgment." Br. 45, n.9. But if those remedies were so closely affiliated with with its original theory, at least *some* court would have mentioned them in response to a dissipation argument. But no lower court has so held, and for good reason—these are creative arguments that talented counsel have crafted for the first time before this Court. As such, they are waived. *See, e.g.*, *Roberts* v. *Galen of Virginia, Inc.*, 525 U.S. 249, 253 (1999). *Cf.* Sup. Ct. R. 15.2.

2. If this Court even entertains Respondent's tardy request for relief, it should remand for further proceedings.

If either a deficiency judgment or a substitutionary-monetary remedy constitutes "equitable relief" under 29 U.S.C. § 1132(a)(3), this Court will be the first *ever* to announce that rule. When this Court, for the first time in *CIGNA*, endorsed new equitable remedies (surcharge, reformation, estoppel), it remanded the case for the lower courts to determine the availability of those remedies. 131 S. Ct. at 1882. So too here: the Court should permit the lower courts to determine whether

Respondent qualifies for a deficiency judgment (it will not) or a substitute-monetary remedy (it will not).

As previously explained, to obtain a deficiency judgment, the defendant must possess the property at the time of judgment. A deficiency judgment is awarded only when the sale of property cannot satisfy the debt. Deficiency judgment is unavailable when there is nothing to sell. U.S. Br. 32-33 (citing 1 Pomeroy § 240, at 451-452; *City Bank* v. *Plank*, 124 N.W. 1000, 1003 (Wis. 1910)); Pet. Br. 37. Also, deficiency judgment was refused if the lienholder failed to behave in a commercially reasonable fashion. Pet. Br. 40 n.21 (citing *Pioneer Dodge Center, Inc.* v. *Glaubersklee*, 649 P.2d 28, 30 (Utah. 1982)). That analysis asked whether the lienholder failed to promptly foreclose on the lien. Pet. Br. 39-41 (discussing *Fidelity Deposit Co.* v. *Central Bank*, 48 F.2d 477 (8th Cir. 1931), and citing *Zack* v. *City of Minneapolis*, 601 F. Supp 117, 120 (D. Minn. 1985)). These are fact questions that cannot be decided on this record. Respondent never sought to have Mr. Montanile's funds placed in escrow, so the funds may be entirely dissipated.[8] And while the district court was not persuaded that the Plan's delay barred an equitable lien, its assessment may change with a different remedy under a different standard. *See* Pet. Br. 40-41 (describing the Plan's delay).

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[8] That Mr. Montanile may have been in possession of at least some of the funds at the time of filing suit is important but ultimately insufficient to obtain a deficiency judgment. A plan's equitable lien and deficiency judgment claims will fail at the outset if the property has been dissipated before the suit is filed because there is no property to foreclose on. A substitutionary monetary remedy *may* be available even if there is dissipation before filing, but that reinforces just how separate such a remedy is from equitable lien by agreement.

A substitutionary-monetary decree also requires further litigation—and, in fact, Respondent cannot prevail under the very cases it cites. Each of those cases involves tortious conduct or fiduciary breach. Even if that remedy were available in cases involving equitable liens by agreement, there is no tortious conduct or fiduciary breach in a bona fide dispute over the contract itself. Respondent disparages Mr. Montanile's challenges to the reimbursement claim, but Petitioner carefully explained that this Court had to resolve one issue Mr. Montanile advanced, and the other remains the subject of a circuit split. Pet. Br. 7 n.6, 40 n.22. It is not tortious conduct to fail to predict the right disposition of such difficult questions, and Mr. Montanile is of course not a fiduciary.

III. Respondent's Policy Arguments Are Overblown and Directed at the Wrong Branch.

Faced with an untenable doctrinal position, Respondent defends its legal rule as a matter of policy and "common sense." Br. 2, 46-56. Respondent's view could not be clearer: The Court should "ensure that the Plan's right to reimbursement is not 'without a remedy' under the statute." Br. 4.[9]

As the United States explained, Br. 26-27, Respondent and its amici have offered exactly the same policy and fairness arguments that this Court rejected in *Great-West*. And the sky did not fall (or even darken). In the intervening years, Congress felt compelled to address Respondent's policy concerns with: precisely nothing. *See, e.g.*, U.S. Br. 28-29 (discussing Congress'

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[9] Even Respondent's lead doctrinal arguments look to policy. *See, e.g.*, Br. 26-27 (Section II.A) ("The Decision Below Is Consistent With Time-Honored Maxims of Equity.").

inaction). Nonetheless, given its central role in Respondent's brief, we address Respondent's policy concerns here:

1. Respondent's professed concern about the sanctity of ERISA plan terms is specious. Respondent notes that "[t]his Court has repeatedly emphasized Congress' goal of ensuring that ERISA plans are administered and enforced according to their terms." Br. 46. True. But that hardly proves that all *relief* is available to remedy a breach. Indeed, Respondent surely knows the following:

When a plan fiduciary in bad faith denies an ERISA plan's promised benefits, the affected participant may only recover the value of the denied benefits. 29 U.S.C. § 1132(a)(1)(B). "[E]quitable relief" under 29 U.S.C. § 1132(a)(3) will *never* entitle the aggrieved participant to recover consequential damages, even for an intentional breach and foreseeable injury. *See, e.g.*, Pet. Br. 46-47 (discussing, *inter alia*, Paul M. Secunda, *Sorry, No Remedy: Intersectionality and the Grand Irony of ERISA*, 61 Hastings L.J. 131 (2009)).

Respondent offers no reason why participants should be constrained by this Court's interpretation of 29 U.S.C. § 1132(a)(3) but fiduciaries should escape so "'equity suffers not a right to be without a remedy.'" Br. 26 (quoting *CIGNA*, 131 S. Ct. 1866, 1879 (2011)) (quoting Richard Francis, *Maxims of Equity* 29 (1st Am. Ed. 1823)).[10] That is unsurprising. No reason exists.

2. Respondent is wrong that tracing rules "burden beneficiaries, plans, and courts," Br. 46, and its concerns illustrate vividly why Congress, and not the courts, set policy:

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[10] *CIGNA* did not change this reality for participants.

First, Respondent speculates wildly that (i) the availability of ERISA remedies affects the likelihood that participants will breach reimbursement provisions, *compare* Br. 48-55, *with* Pet. Br. 42-44, and (ii) fiduciaries will otherwise be unable to protect their reimbursement rights, *compare* Br. 55-56, *with* Pet. Br. 44-45; U.S. Br. 29-31.

The parties' good-faith disagreement should end the inquiry. This is precisely the type of empirical question that legislators must study in setting policy. It falls outside the judiciary's proper role and core competency. For that reason, this Court in *Great-West* expressly rejected the exact same arguments advanced by Respondent and its amici here. Indeed, Respondent's amici appear to have rehashed portions their *Great-West* briefs nearly verbatim:

AMICUS BRIEFS OF THE SELF INSURANCE INSTITUTE OF AMERICA

Great-West	***Montanile***
"[P]lan sponsors would be encouraged to defer or delay payment of claims for medical expenses related to third party negligence until the accident liability issues have been fully resolved or until after third party litigation has been terminated" Br. 9.	"[P]lan providers . . . could elect to defer or delay payment of claims for medical expenses related to another party's negligence until the accident liability issues have been fully resolved or until litigation has concluded" Br. 30.

"Plan sponsors are likely to amend their plans to exclude coverage for medical expenses related to negligent third-party" Br. 9.	"[P]lan sponsors might be compelled to amend their plans to exclude coverage for medical expenses related to the negligence of other parties" Br. 30.

AMICUS BRIEFS OF MULTI-EMPLOYER PLANS

Great-West	*Montanile*
"[This] will result in the nonuniform enforcement of plans[and] an increase in administrative costs for plans . . . all to the detriment of plan beneficiaries." Br. 2-3.	"The result of losing a uniform equitable remedy in the federal courts will be increased administrative costs . . and a concomitant reduction in benefits for . . beneficiaries." Br. 27.

AMICUS BRIEFS OF THE NATIONAL ASSOCIATION OF SUBROGATION PROFESSIONALS

Great-West	*Montanile*
"[This will result] in a reduction in health care benefits for all plan participants or a significant increase in costs for the participant." Br. 2.	"[E]mployers may be forced to reduce or eliminate certain benefits, increase premiums, or do both . . . ." Br. 29.

Plan fiduciaries will predict the same parade of horribles every time they face a possible limit on pursuing reimbursement claims. Whether those concerns are legitimate or warrant legislative change are questions for Congress to decide. In any event, plan fiduciaries have thrived for nearly fifteen years in the current legal environment. U.S. Br. 29-30.

Second, Respondent focuses on purported benefits of its preferred policy (reducing non-compliance and lowering plan costs) while overlooking predictable costs that a fair-minded policymaker might wish to avoid.

As previously explained, the question presented here affects not only subrogation but *every* type of ERISA benefit, including pension and disability insurance. *See* Pet. 7-8. There are compelling policy reasons to disfavor Respondent's proposed rule in those other settings. *See, e.g.*, Br. of AARP 6-15 (Respondent's rule causes grossly unfair results in the pension-overpayment context); Br. of United Policyholders 6-15 (Respondent's rule is grossly unfair in the disability-insurance context and functions as an industry end-run around Congress' anti-alienation provision in the Social Security Act).

Conspicuously absent from Respondent's brief is any mention of these other contexts. That is telling given that a majority of decisions constituting the current circuit conflict arises outside the subrogation context.

In short, the proper scope of ERISA is a policy determination for the political branches. This Court has construed (repeatedly) the controlling terms of that statute, and its consistent construction compels reversal.

CONCLUSION

For the reasons set forth above, the judgment of the Eleventh Circuit should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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